

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

No. C 10-00859 RS

Plaintiff,

v.

GARY LEE HARDEMAN,

Defendant.

**ORDER DENYING MOTION FOR
RECONSIDERATION AND MOTION
TO DISMISS INDICTMENT**

Defendant Gary Hardeman has now added three motions to the long list defendant has thus far filed in this action. The first, a motion for a bill of particulars as to Count One, was resolved at oral argument on April 22, 2013. The government represented that it intends to prove a violation of only subsection (1) under 18 U.S.C. § 2246(2), that it will not pursue a theory of a commercial sex act under 18 U.S.C. § 1591, and that it will pursue a basis for conviction both on attempt and completed criminal conduct. As this information addresses defendant's concern in his request for a bill of particulars, it need not be addressed further. Defendant's second motion seeks reconsideration of this Court's previous denial of defendant's motion to dismiss for prejudicial delay and adds the argument that delay arising from post-accusation events similarly warrants dismissal. Finally, defendant moves to dismiss Count II of the superseding indictment

1 resulting from specific performance of defendant's underlying state court plea bargain. For the
2 following reasons, motions two and three must be denied.

3 *A. Motion to Reconsider Denial for Prejudicial Delay*

4 Defendant moves for reconsideration of this Court's order denying defendant's motion to
5 dismiss the indictment due to prejudicial delay, arguing that, since that order, new facts have
6 emerged that demonstrate he has been prejudiced. Under Northern District of California Local
7 Rule 7-9(b)(2), reconsideration of a motion already litigated is permitted upon the "emergence of
8 new material facts." Previously, this Court found unconvincing defendant's arguments that pre-
9 indictment delay resulted in the inability to obtain a psychiatric evaluation of the alleged minor
10 victim and the loss of potential witnesses and records from the Salvation Army Shelter where she
11 was taken immediately after the events in question. The government opposes defendant's
12 motion on the grounds that the "new fact" alleged is not material to this Court's reason for
13 denying the previous motion.

14 Defendant additionally argues that he has been prejudiced by post-accusation delay. The
15 government responds that any such delay has been caused by defendant's own motion practice
16 and the government's successful appeal to the Ninth Circuit.

17 *1. Pre-Indictment Delay*

18 The Ninth Circuit has adopted a two-prong test for determining whether pre-indictment
19 delay violates a defendant's due process rights. *See United States v. Huntley*, 976 F.2d 1287,
20 1290 (9th Cir. 1992). The first requires the court to determine whether the defendant suffered
21 actual, non-speculative prejudice as a result of the delay. *See id.* Actual prejudice constitutes
22 either the loss of witnesses or physical evidence, or the impairment of their use. *United States v.*
23 *Mays*, 549 F.2d 670, 677 (9th Cir. 1977). If prejudice is established, the court must then balance
24 the length of the delay against any reasons for it to determine whether "those fundamental
25 conceptions of justice which lie at the base of our civil and political institutions" have been
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1 offended. *Huntley*, 976 F.2d at 1290 (quoting *United States v. Sherlock*, 962 F.2d 1349, 1353-54
2 (9th Cir. 1992).

3 Defendant contends the grand jury testimony of the alleged victim, which the government
4 subsequently has disclosed, reveals actual prejudice resulting from the loss of the shelter
5 witnesses and records, as the victim testified that she “told ‘em everything, the whole story.”
6 Defendant asserts that this new information is critical because the government’s entire case rests
7 on the testimony of the alleged victim, and in this grand jury testimony she represents for the
8 first time that she told shelter workers what happened to her. Thus, defendant concludes, the
9 prejudice resulting from the loss of the shelter workers’ testimony has shifted from being
10 speculative to actual. Without being able to interview those shelter workers, he contends, no
11 evidence is available to rebut the victim’s post-hoc claim that she reported being raped by
12 defendant shortly after the event occurred. The substance of any testimony that the workers may
13 have been able to provide, however, remains entirely speculative. In fact, the victim in her grand
14 jury testimony never specified what she told those shelter workers if it indeed related to the
15 alleged rape at all. Defendant has not satisfied his burden to show non-speculative prejudice.
16 Alternatively, defendant requests that the government be precluded from introducing evidence
17 that the alleged victim told shelter workers she was raped. For the same reasons there is no basis
18 on which to dismiss the indictment, there is similarly no basis on which to exclude such
19 testimony, and the request must therefore be denied.

20 Defendant also notes that, since the events in question, he has lost two important defense
21 witnesses who would provide evidence as to defendant’s innocent motivations for traveling to
22 Mexico: his father has died, and his mother is no longer competent to testify. While it is far from
23 clear that this testimony would be admissible in the first instance, even if so, defendant has not
24 demonstrated actual prejudice from the loss of these two witnesses. The relevance of the
25 proposed testimony is tangential at best, given that the crime for which defendant has been
26 charged does not require the government to prove any motivation or intent whatsoever. To the

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1 extent that these witnesses would testify to defendant's pattern of routine travel, other forms of
2 evidence presumably would be available. Defendant has not presented any new facts sufficient
3 to alter this Court's previous denial of the motion to dismiss the indictment due to pre-indictment
4 delay.

5 *2. Post-Accusation Delay*

6 The standard for post-accusation delay under the Speedy Trial Clause of the Sixth
7 Amendment involves a balancing test of four factors: "Length of delay, the reason for the delay,
8 the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S.
9 514, 530 (1972) (footnote omitted). Depending on the nature of the charges, "courts have
10 generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one
11 year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (citations omitted). Defendant
12 argues that, as 56 months have passed since the filing of the first indictment, and 28 months have
13 passed since the filing of the operative indictment, the post-indictment delay is presumptively
14 prejudicial.

15 Defendant's calculations are flawed. Unless bad faith is demonstrated, when the
16 government dismisses an indictment and recharges defendant based on the same conduct, the
17 time between the dismissal and the reinstatement of charges does not count under the Speedy
18 Trial Clause. *United States v. MacDonald*, 456 U.S. 1, 8-9, 10 n.12 (1982). Defendant argues
19 the government's dismissal of the charges just days before trial was done in bad faith. The
20 government, however, explains the present case is entirely different from the one previously
21 charged under 18 U.S.C. § 2250 for failure to register as a sex offender. Leading up to trial in
22 that case the prosecutor decided to dismiss the charges. Meanwhile, the government continued
23 to collect evidence in this, more complicated, case brought under 18 U.S.C. § 2246. The Ninth
24 Circuit has made clear that charging a defendant with one crime while continuing to investigate
25 another arising out of the same set of facts does not amount to bad faith. *United States v.*
26 *Wallace*, 848 F.2d 1464, 1469 (9th Cir. 1988). Defendant has shown no evidence on which to

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1 find the government acted for tactical advantage in choosing to seek and obtain the indictment of
2 defendant on different charges at a later date. *Id.*

3 When considering only the 28 months that have passed since the present indictment was
4 filed, the bulk of the post-accusation time has taken the form of defendant's own motion
5 practice, or the government's successful interlocutory appeal to the Ninth Circuit. Neither of
6 these reasons for delay can be counted against the government. About eight months have been
7 spent on defendant's interesting, but extensive and seriatim motion practice. An additional
8 fifteen months were consumed by an interlocutory appeal regarding Count II. The government
9 has demonstrated that this interlocutory appeal was justifiable and thus the time cannot count
10 against it. *United States v. Loudhawk*, 474 U.S. 302, 315 (1986) (considering several factors to
11 determine whether an interlocutory appeal is justified, including "strength of the government's
12 position on the appealed issue, the importance of the issue in the posture of the case, and – in
13 some cases – the seriousness of the crime.") (citing *United States v. Herman*, 276 F.2d 1139,
14 1146 (CA5 1978)). First, the government has shown it had a strong position on the issue, as the
15 Ninth Circuit reversed this Court's ruling in a published 3-0 opinion. Indeed, as a result,
16 defendant faces the prospect of a significantly increased sentence in the event of conviction.
17 Finally, there is no doubt that the crimes charged are extremely serious. Accordingly, 23 of the
18 28 months since the indictment was filed cannot count against the government.

19 The government explains that, of the remaining five months, one month was spent
20 transporting defendant from Hawaii, one month passed before defendant's initial appearance,
21 and two months were spent preparing motions. None of these blocks of time are unreasonable or
22 operated to prejudice defendant. Accordingly, no post-accusation delay justifies the dismissal of
23 the indictment.

24 3. *Motion to Dismiss Count II*

25 Defendant asserts that he is entitled to specific enforcement of two plea bargains entered
26 into in California state court and that, as a result, Count Two should be dismissed. While

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1 defendant acknowledges the Ninth Circuit reversed this Court's dismissal of Count Two under
2 the ex post facto clause, he notes the door was left open for other due process claims, including
3 the right to enforce the terms of a plea agreement. According to those agreements, he contends,
4 his convictions should be expunged and he should thereby be relieved of his duty to register as a
5 sex offender if he successfully completed the obligations imposed on him.

6 Defendant notes that oral, as well as written, agreements are binding contracts
7 enforceable in court. *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003). As such, he argues,
8 the implicit oral promises made during the course of the plea bargaining process, apparently by
9 the state court rather than the prosecutor, must be enforced. In so arguing, defendant relies
10 heavily on *People v. Arata*, 151 Cal. App. 4th 778 (CA 4 2007), in which the defendant was told
11 his crimes would be expunged under a state law that was changed after his conviction and
12 sentencing. *Id.* at 282. The California appellate court found that the plea agreement contract
13 was binding, even if the prosecutor had no right to make the promise he did. *Id.* at 1161 (citing
14 *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992)). In that case, however, a transcript
15 indicated the prosecutor had indeed made such a promise. Here, in contrast, defendant can point
16 to no evidence, either written or recorded in testimony, to suggest that an understanding was
17 reached between the parties that defendant should be relieved of his obligation to register as a
18 sex offender. Additionally, in *Arata*, the defendant was provided the benefit of avoiding jail
19 time, which the court found to be an indication that the prosecution intended to strike a lenient
20 bargain. The court concluded the implied promise flowed from that bargain. In the state court
21 proceeding here, on the other hand, the prosecution argued for jail time, a recommendation the
22 court ultimately did not take, giving no indication the prosecution intended any such lenient
23 bargain. While defendant bases his argument on an interpretation of the plea agreement as
24 functioning as a contract between the defendant and the court, as opposed to defendant and the
25 prosecutor, he points to no authority or facts to support such a theory. Moreover, the state of the
26 law on whether implicit conditions are binding despite subsequent changes in state law is

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1 unclear, as demonstrated by the absence of a ruling by the California Supreme Court on a
2 question certified to it by the Ninth Circuit. *See Doe v. Harris*, 640 F.3d 972 (9th Cir. 2011).

3 Even if defendant were correct in asserting that he had an implicit agreement with the
4 state that he would be relieved of his duty to register as a sex offender, he could not enforce that
5 agreement in federal court. The authority on which defendant relies for the proposition that a
6 federal court must enforce the terms of a state plea agreement are habeas cases, in which the
7 federal court sits as a constitutional reviewer of the state court process. *See, e.g., Poole*, 337
8 F.3d 1155; *Davis v. Woodford*, 446 F.3d 957 (9th Cir. 2006); *Buckley v. Terhune*, 441 F.3d 688
9 (9th Cir. 2006). That situation simply is not analogous to the present one, in which defendant
10 seeks to obtain the benefit of an alleged bargain made in state court to thwart a prosecution on
11 federal charges in federal court. Accordingly, defendant's motion to dismiss Count Two must be
12 denied.

13 IT IS SO ORDERED.

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15 DATED: 4/26/13



RICHARD SEEBORG
United States District Judge

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